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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/654,228	09/03/2003	Michael G. Hayek	P127C	4744

27752 7590 01/03/2008

THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION - WEST BLDG.
WINTON HILL BUSINESS CENTER - BOX 412
6250 CENTER HILL AVENUE
CINCINNATI, OH 45224

EXAMINER	
SCHLIENTZ, NATHAN W	
ART UNIT	PAPER NUMBER
1616	

MAIL DATE	DELIVERY MODE
01/03/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/654,228	HAYEK ET AL.	
	Examiner	Art Unit	
	Nathan W. Schlientz	1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *15 November 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1 and 2* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1 and 2* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 15 November 2007 has been entered.

Status of Claims

Claim 3 has been cancelled and claim 1 has been amended in an amendment filed 15 November 2007. As a result, claims 1 and 2 are pending and thus examined herein on the merits for patentability. No claim is allowed at this time.

Response to Arguments

Applicant's arguments, see Applicant's Remarks, filed 15 November 2007, with respect to the rejections of claims 1-3 under 35 U.S.C. 102(b) have been fully considered and are persuasive in light of the claim amendment incorporating the protein, fat and fiber content into the dog food diet. Therefore, the rejections have been withdrawn. However, upon further consideration, new grounds of rejections are made in view of newly found prior art.

Withdrawn Rejections

1. The rejection of claims 1 and 2 under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 6,133,317 (Hart) is hereby **withdrawn** by the examiner in light of the aforementioned claim amendments wherein the limitations of the protein, fat, and fiber content of the dog food is incorporated into the instant claims, and Hart does not disclose all the instant limitations.

2. The rejection of claim 1 under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,965,153 (Allen) is hereby **withdrawn** by the examiner in light of the aforementioned claim amendments wherein the limitations of the protein, fat, and fiber content of the dog food is incorporated into the instant claims, and Hart does not disclose all the instant limitations.

3. The rejection of claim 1 under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,976,549 (Lewandowski) is hereby **withdrawn** by the examiner in light of the aforementioned claim amendments wherein the limitations of the protein, fat, and fiber content of the dog food is incorporated into the instant claims, and Hart does not disclose all the instant limitations.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140

F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

1. Claims 1 and 2 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3 of U.S. Patent No. 6,641,836. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims are directed to feeding a dog 1 to 10 g garlic per kg of diet wherein the diet comprises about 20 to 40 wt.% protein, about 4 to 30 wt.% fat, and about 1 to 11 wt.% fiber. The instant application is drawn to a method for enhancing immune response in said dog, whereas the '836 patent claims a method for increasing lymphocyte blastogenesis in said dog. However, increasing lymphocyte blastogenesis inherently enhances an immune response (col. 1, ll. 61-65 of the '836 patent). Therefore, the '836 patent is inherently enhancing an immune response in the dog being fed the claimed garlic containing feed.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in Graham v. John Deere Co., 383 U.S. 1,148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

1. Claims 1 and 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,133,317 (Hart) in view of U.S. Patent No. 3,511,910 (Halleck).

Applicant claims:

Applicants claim a method for enhancing the immune response of a dog by feeding said dog a diet comprising about 1 to 10 g garlic, about 20 to 40 wt.% protein, about 4 to 30 wt.% fat, and about 1 to 11 wt.% fiber.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Hart teaches feeding a canine a diet comprising oxalic acid, crude protein, crude fat, crude fiber and moisture (Examples 119-121). Hart further teaches feeding 1 lb carrots, 1 lb parsley and 1 tsp garlic, a source of oxalic acid (col. 5, ll. 35-52), with 1 to

1½ lbs dry dog food (col. 16, ll. 11-15), which is approximately 2.6 to 4.4 g garlic per kg total dog food (see pages 4-5 of the office action mailed 16 April 2007). Hart also teaches that garlic is believed to fight infection, cancer, bacteria, virus, and heart disease (col. 29, ll. 58-59).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

Hart does not teach the amounts of protein, fat and fiber are contained in the dry dog food fed in conjunction with the garlic. However, Halleck teaches that commercial dry dog food constituted the basal ration of 24% crude protein, 8% crude fat and 4.5% crude fiber.

Finding of *prima facie* obviousness

Rational and Motivation (MPEP 2142-43)

Therefore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to use the commercial dry dog food taught by Halleck, which comprises 24% crude protein, 8% crude fat and 4.5% crude fiber, as the dog food mixed with 1 tsp of garlic per 1 to 1½ lbs dry dog food, as reasonably taught by Hart.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

2. Claims 1 and 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,965,153 (Allen) in view of Hart and Halleck.

Applicant claims:

Applicants claim a method for enhancing the immune response of a dog by feeding said dog a diet comprising about 1 to 10 g garlic, about 20 to 40 wt.% protein, about 4 to 30 wt.% fat, and about 1 to 11 wt.% fiber.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Allen teaches feeding a dietary supplement to a dog comprising garlic, protein, fat and fiber (col. 2, ll. 8-30); wherein the supplement fosters healthy skin which includes the reduction or elimination of occurrences of fungus infections and seasonal dry skin (col. 2, ll. 60-62). Allen further teaches that the dietary supplement is mixed with the animal's food once daily (col. 2, ll. 41-42).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

Allen does not teach the specific amount of garlic used in the dietary supplement, which is effective at treating fungal infections. However, Hart teaches that approximately 2.6 to 4.4 g garlic per kg total dog food is sufficient to treat infections (col. 16, ll. 13-15; and col. 29, ll. 58-59).

Also, Allen does not teach the total protein, fat and fiber content of the dog food. However, Halleck teaches commercial dry dog food comprises 24% crude protein, 8% crude fat and 4.5% crude fiber.

Finding of *prima facie* obviousness

Rational and Motivation (MPEP 2142-43)

Therefore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to use 2.6 to 4.4 g garlic per kg total dog food, as reasonably taught by Hart, in the dietary supplement as taught by Allen for fostering healthy skin by reducing or eliminating occurrences of fungus infections and seasonal dry skin. Furthermore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to mix the dietary supplement of Allen with commercial dry dog food comprising 24% crude protein, 8% crude fat and 4.5% crude fiber, as reasonably taught by Halleck.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

3. Claims 1 and 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,976,549 (Lewandowski) in view of Hart and Halleck.

Applicant claims:

Applicants claim a method for enhancing the immune response of a dog by feeding said dog a diet comprising about 1 to 10 g garlic, about 20 to 40 wt.% protein, about 4 to 30 wt.% fat, and about 1 to 11 wt.% fiber.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Lewandowski teaches eliminating odors from a dog's breath by feeding raw garlic, which has been shown to lower blood pressure, reduce blood cholesterol, promote cardiovascular activity, soothe the respiratory system, relieve gas and indigestion, reduce yeast infections, and provide systemic insect repellent (col. 2, ll. 34-49), as well as killing odor-causing bacteria in the mouth (col. 4, l. 41). Lewandowski further teaches that it is preferred to mix uncooked garlic with a dog's food or snacks (col. 5, ll. 9-15).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

Lewandowski does not teach the specific amount of garlic used to coat the dog's food, which is effective at lowering blood pressure, reducing blood cholesterol, promoting cardiovascular activity, soothing the respiratory system, relieving gas and indigestion, reducing yeast infections, and providing systemic insect repellent, as well as killing odor-causing bacteria in the mouth. However, Hart teaches that approximately 2.6 to 4.4 g garlic per kg total dog food is sufficient to fight infection, cancer, bacteria, virus, and heart disease (col. 16, ll. 13-15; and col. 29, ll. 58-59).

Also, Lewandowski does not teach the total protein, fat and fiber content of the dog food. However, Halleck teaches commercial dry dog food comprises 24% crude protein, 8% crude fat and 4.5% crude fiber.

Finding of *prima facie* obviousness

Rational and Motivation (MPEP 2142-43)

Therefore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to use 2.6 to 4.4 g garlic per kg total dog food, as reasonably taught by Hart, in the coating of dog food as taught by Lewandowski for lowering blood pressure, reducing blood cholesterol, promoting cardiovascular activity, soothing the respiratory system, relieving gas and indigestion, reducing yeast infections, and providing systemic insect repellent, as well as killing odor-causing bacteria in the mouth. Furthermore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to mix the uncooked garlic of Lewandowski with commercial dry dog food comprising 24% crude protein, 8% crude fat and 4.5% crude fiber, as reasonably taught by Halleck.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

4. Claims 1 and 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,156,355 (Shields et al.) in view of Hart.

Applicant claims:

Applicants claim a method for enhancing the immune response of a dog by feeding said dog a diet comprising about 1 to 10 g garlic, about 20 to 40 wt.% protein, about 4 to 30 wt.% fat, and about 1 to 11 wt.% fiber.

Determination of the scope and content of the prior art

(MPEP 2141.01)

Shields et al. teach dog formulations comprising at least 22 wt.% crude protein, at least 10 wt.% crude fat, at most 4 wt.% crude fiber, and garlic powder (Examples 1-5). Shields et al. further teach that garlic is thought to have some natural ability to inhibit growth of pathogenic organisms (col. 14, ll. 52-54).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

Shields et al. do not teach the specific amount of garlic added to the dog food formulations, which is believed to inhibit growth of pathogenic organisms. However, Hart teaches that approximately 2.6 to 4.4 g garlic per kg total dog food is sufficient to fight infection, cancer, bacteria, virus, and heart disease (col. 16, ll. 13-15; and col. 29, ll. 58-59).

Finding of *prima facie* obviousness

Rational and Motivation (MPEP 2142-43)

Therefore, it would have been *prima facie* obvious for one skilled in the art at the time of the invention to use approximately 2.6 to 4.4 g garlic per kg total dog food, as reasonably taught by Hart, in the dog food formulations of Shields et al. in order to inhibit growth of pathogenic organisms.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Contact Information

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nathan W. Schlientz whose telephone number is 571-272-9924. The examiner can normally be reached on 8:30 AM to 5:00 PM, Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Nathan W. Schlientz
Patent Examiner
Technology Center 1600
Group Art Unit 1616

SABIHA QAZI, PH.D
PRIMARY EXAMINER

Sabiha N. Qazi
Primary Patent Examiner
Technology Center 1600
Group Art Unit 1616